STATE OF MICHIGAN

IN THE SUPREME COURT

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee,<br><br>v<br><br>DANIEL HORACEK,<br><br>Defendant-Appellant.<br>_____/ | Supreme Court No. 152567<br><br>Court of Appeals Case No. 317527<br><br>Oakland County Circuit Court<br>Case No. 2012-241894-FH<br><br>Hon. Shalina D. Kumar |

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# APPELLANT DANIEL HORACEK'S SUPPLEMENTAL BRIEF

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# STATEMENT OF QUESTIONS PRESENTED

**1. Was the officers' warrantless entry into Defendant Daniel Horacek's motel room justified by exigent circumstances known to the officers at the time?**

Trial court answered: Yes.

Court of Appeals answered: Yes.

Appellant answers: No.

***Authority***: *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201(1993) ("The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers and others, or (3) prevent the escape of a suspect.").

**2. When defense counsel and the trial court tell a defendant his plea will preserve his appeal of a certain pre-trial ruling, and that he may "start fresh" if that ruling is reversed, is the defendant entitled to withdraw his plea when that ruling is reversed?**

Trial court answered: Yes.

Court of Appeals answered: No.

Appellant answers: Yes.

***Authority***: MCR 6.301(C)(2) ("A defendant may entire a conditional plea of . . . nolo contedere . . . [which] preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal.").

## INTRODUCTION

The Fourth Amendment to the United States Constitution protects the right to privacy to some extent in many spheres, but it guards that right with the utmost zeal at the entrance to private quarters. Be it a private residence or a motel room, government intrusion into the sanctity of one's abode without a warrant is presumptively unreasonable under the Fourth Amendment, unless the circumstances known to the officers at the time present such an exigency that they are excused from waiting for a neutral magistrate to issue a warrant.

No evidence of such exigency exists here. Why officers in this case needed to enter Mr. Horacek's hotel room without first obtaining a warrant remains a mystery because no officer has testified to explain it. Without any evidence as to specific and objective facts officers relied on to justify their warrantless intrusion, the Court has no choice but to hold that a Fourth Amendment violation occurred. But even if the Court looks beyond the record evidence to the unsupported assertions and argument of the prosecuting attorney, it still should conclude a constitutional violation occurred. No compelling reason has ever been given as to why officers could not secure the premises to prevent Mr. Horacek's escape and wait for a neutral magistrate's decision before intruding into Mr. Horacek's quarters. The trial court erred in denying Mr. Horacek's motion to suppress the fruits of that unlawful warrantless entry.

Having made that error, the trial court should now be held to its repeated representations to Mr. Horacek that if its decision was reversed, Mr. Horacek could return to the court and "start fresh." The trial court without equivocation told him that a reversal would mean Mr. Horacek could return and file any motion he wanted, even a motion to quash the bind over; he would not be bound by his plea. And the prosecutor tacitly consented to this arrangement.

Refusal to honor the conditional nature of Mr. Horacek's plea would be a violation of MCR 6.301(C)(2), which expressly allows such mutually-consensual conditional pleas. Nothing in the text of that court rule suggests that the Court intended to impose any other requirements—such as lack of prosecutability—and the comment to that rule demonstrates the court deliberately omitted such a requirement. But beyond that, failure to honor the conditional terms of Mr. Horacek's plea would violate his Sixth Amendment to right to trial, since Mr. Horacek agreed to waive that right only in exchange for a conditional plea, not an unconditional one. The Court should reverse the Court of Appeals and remand to the trial court with an instruction to permit Mr. Horacek to withdraw his plea.

## STATEMENT OF FACTS

Because the only facts relevant to reviewing the questions presented are those supported by record evidence and known to the officers at the time of the warrantless entry, the following Statement of Facts relies exclusively upon the June 22, 2012 preliminary examination transcript and the parties' stipulations and concessions made in connection with Mr. Horacek's motion to suppress. This Statement eschews all judicial fact-finding entered thereafter because it is based largely upon information unknown to the officers at the time and on post-hearing, unsworn assertions in the pre-sentence report.

### Officers respond to a 911 report of a robbery at the Dollar Value Store in Orion Township.

On the evening of June 4, 2012, a man walked up to the purchasing counter at the Dollar Value in Orion Township with a candle. (6/22/2012 Prelim Exam Tr, p 9 lns 14-25, p 10 ln 1, p 16 ln 3.) He told the store clerk, Sarah Halyckyj, that he had to go get his wallet from his car and walked out of the store. (*Id*. at 9.) In short order, the man pulled his car up to store front, re-

entered the store, looked around as if confused, and returned to the counter where he had left the candle. (*Id*. at 9-10, 12.) After Ms. Halyckyj put the candle in the shopping bag, the man said, "Ma'am, I don't want to scare you, but I need you to open the register." (*Id*. at 10, 15.) After some hesitation and resistance, the man again instructed Ms. Halyckyj to open the register. (*Id*. at 26.) She opened the register, took out the money, and put it in the bag. (*Id*. at 10, 26.) The man walked out of the store with the bag, got in his car, and left. (*Id*. at 17.)

When asked at the preliminary examination why she complied, Ms. Halyckyj said, "he looked weird, like his hands were in his pockets and I wasn't sure what could be in there." (*Id*. at 10, 15; see also Prelim Exam Ex 2I.) When asked whether there was "[a]nything about the motion or gestures" that she could recall, she answered: "He was looking down and his hands were in his pockets. So it just gave me the idea that he might have had something in there." (*Id*. at p 18, lns 2-6.)[1] She was then asked "[w]hat did you mean by something in there?" (*Id*. at 19.) And she responded: "Anything to hurt me with." (*Id*.) At no point did the man ever threaten to harm Ms. Halyckyj, say anything to suggest he carried a weapon, or even gesture with his pocketed hand as if to suggest it held a weapon. (*Id*. at 25-28.)

**One or two hours later, police officers break down the door to Mr. Horacek's motel room without a warrant, seize narcotics and paraphernalia, and arrest Mr. Horacek.**

An hour or two later that same night, Officer Miller of the Auburn Hills Police Department received a call to be on the lookout for Mr. Horacek and the vehicle he had rented, based on a robbery that occurred that evening. (10/11/2012 Gov't's Br in Support of Resp to Mot to Suppress 2.) After hearing the "BOL," Officer Miller proceeded to the Roadway Inn. (10/10/12 Mot to Suppress ¶ 7; 10/11/12 Answer to Mot to Suppress ¶ 7.) Upon confirming with

[1] The question and answer that followed was stricken as leading. (6/22/2012 Prelim Exam Tr, p 18, lns 19-24.)

the motel clerk that Mr. Horacek had rented a room, Officer Miller obtained a key card for the room. (10/10/2012 Mot to Suppress ¶ 8, 10; 10/11/2012 Answer to Mot to Suppress ¶¶ 8, 10.) Other officers arrived around that time for support. (10/10/2012 Mot to Suppress ¶¶ 9-10; 10/11/12 Gov't's Br in Support of Resp to Mot to Suppress 2 (noting that "Officer Miller and other officers obtained a key card").

When the officers knocked on the door of Mr. Horacek's room and received no answer, they used the key card to open the door. (10/10/2012 Mot to Suppress ¶¶ 11-12; 10/11/2012 Answer to Mot to Suppress ¶¶ 11-12.) The door would only open a crack, however, because the security latch was engaged. (10/10/2012 Mot to Suppress ¶ 12; 10/11/2012 Answer to Mot to Suppress ¶ 12.) This minimal entry allowed the officers to see a man move from the bed towards the bathroom area of the room. (10/10/2012 Mot to Suppress ¶ 13; 10/11/2012 Answer to Mot to Suppress ¶ 13.) One of the officers then kicked open the door and the police entered the room. (10/10/2012 Mot to Suppress ¶ 14; 10/11/2012 Answer to Mot to Suppress ¶ 14.) The officers had no warrant at the time that they entered the room and conducted the arrest. (10/10/2012 Mot to Suppress ¶¶ 16-17; 10/11/2012 Answer to Mot to Suppress ¶¶ 16-17.)

As a result of their warrantless entry, the officers not only arrested Mr. Horacek but also discovered and seized narcotics and drug paraphernalia. (10/11/12 Gov't's Br in Support of Resp to Mot to Suppress 2; 10/12/2012 Mot Hr'g Tr 4.) After he was taken back to the police department and given his *Miranda* warnings, Mr. Horacek made an inculpatory statement. (10/12/2012 Mot Hr'g Tr 4.)

**Mr. Horacek is charged with armed robbery, but bound over only on the charge of unarmed robbery, based on the testimony of the store clerk.**

Soon after his detention, Mr. Horacek was charged with armed robbery and the district court held a preliminary examination. (6/22/2012 Prelim Exam Tr 32.) The only witness who

testified at the preliminary examination was the store clerk, Ms. Halyckyj. (See generally *id*.) Ms. Halyckyj told her story about the theft on June 4, and identified Mr. Horacek as the robber. (*Id*. at 11.) But the government elicited no testimony from her about any communications she may have had with officers that evening, nor did the government call any officers to testify about the circumstances of the warrantless entry into Mr. Horacek's motel room or his arrest.

Based on Ms. Halyckyj's testimony and the admitted evidence, including the video stills and DVD recording of the robbery (see Prelim Exam Exs), the district court saw no probable cause to believe Mr. Horacek was armed during the robbery or that he even represented orally or through gestures that he was armed during the robbery. (*Id*. at 36-37.) Accordingly, it bound Mr. Horacek over only on the charge of *unarmed* robbery. (*Id*., p 37 ln 25, p 38 ln 1-2.)

**Mr. Horacek files a motion to suppress all evidence acquired through the warrantless entry; without evidence, the government asserts exigent circumstances existed.**

Several months later, Mr. Horacek filed a motion to suppress all evidence gathered as a result of the warrantless entry on the basis it violated his Fourth Amendment right to be secure against unreasonable searches and seizures. Mr. Horacek's counsel argued for exclusion not only of Mr. Horacek's inculpatory statement at the police department but also of the narcotics and paraphernalia found at the scene. (See generally 10/10/2012 Mot to Suppress; 10/12/2012 Mot Hr'g & Plea Hr'g Tr 4.) Again the government presented no testimonial or documentary evidence regarding the circumstances of the warrantless entry or what information the officers would have known at the time of the entry to justify their decision. (See generally 10/11/2012 Answer to Mot to Suppress & Br.) Though the prosecutor presented a detailed story in his brief, he never pointed to a single item of record evidence for support.

Nevertheless, the Oakland County Circuit Court denied Mr. Horacek's motion based on a number of factual findings. (10/12/2012 Mot Hr'g & Plea Hr'g Tr 9-10.) Without explanation,

the circuit court first found that a crime of violence was involved. (*Id*.) It then determined that the officers (who never testified) reasonably believed Mr. Horacek to be armed. (*Id*.) The court further concluded there was probable cause to believe Mr. Horacek was in the motel room, and "although the prosecutor didn't say this," found "a likelihood that the suspect . . . would have escaped if they had not gone in and got him at that point." (*Id*.) Finally, the court reasoned that there was "an issue of preventing destruction of evidence, as well as ensuring the safety of law enforcement, since there was a reasonable belief at the time that this defendant was armed." (*Id*.)

**Mr. Horacek pleads no contest upon the advice of counsel and the court's repeated assurance that he could appeal the denial of his motion to suppress.**

After the court denied his motion to suppress, Mr. Horacek agreed to plead no contest. (10/12/2012 Mot Hr'g & Plea Hr'g Tr 36.) But before he did so, he confirmed first with his own counsel and then with the court that he could preserve an appeal of the court's order denying his motion to suppress:

> Mr. Lynch [defense counsel]: Although with all due respect to the Court, he feels the Court is wrong on its decision on the Fourth Amendment issue, I've explained to him that I believe that that issue is preserved –
>
> The Court: It is.
>
> Mr. Lynch: -- at this point, since –
>
> The Court: It is.
>
> Mr. Lynch: --we argued motions and it was on the record.
>
> * * *
>
> Mr. Lynch: His concern, if he enters a plea, is that those issues aren't preserved for purposes of appeal. . . . I believe that the Fourth Amendment issue is preserved. . . .
>
> The Court: It is preserved . . . .
>
> * * *

The Court: If I were to get reversed on the ruling I just made, it opens up the possibility for him to file a motion to quash. It would come back to me. And he could do that, if he wanted.

Mr. Novy [prosecutor]: That's pos—I suppose that's possible.

* * *

Mr. Lynch: Yes. And I guess—I just want to make sure that—I believe that my client will enter a plea of no contest pursuant to the *Cobbs* evaluation. However, prior to doing that, I would ask the Court to at least state on the record that not only is—the Fourth Amendment issues are preserved but his ability, if needed, to then file a motion to quash. Is that correct? So that he can appeal.

Is that what you're asking, Mr. Horacek?

The Court: Yes, both issues will be preserved for appeal. Yes.

* * *

Mr. Lynch: Now this Court having stated those issues are preserved, he accomplishes what he wants and that—those issues are ripe for being looked at in the appellate courts.

The Court: Correct.

Mr. Lynch: Do you understand that, Mr. Horacek?

Mr. Horacek: Okay. Just as long as—I believe I understand it.

* * *

Mr. Horacek: . . . I read something from the law library and it says I have to do something, and I just wanted to raise it. That's what—

The Court: Your issue's—

Mr. Horacek: --this was all about.

The Court: --preserved. Your issue's preserved for appeal.

* * *

The Court: . . . . Listen. This is what would happen.

Mr. Horacek: Okay.

The Court: If they reversed me on the Fourth Amendment issue,--

> Mr. Horacek: Yes.
>
> The Court: --it comes back to me and we start fresh.
>
> Mr. Horacek: Okay.
>
> The Court: And if you want at that point to file a motion to quash, you get to file a motion to quash.
>
> * * *
>
> The Court: . . . . They're going to be looking at the Fourth Amendment issue. . . . If I get reversed on the ruling I just made, then we start fresh; and you can file whatever motions you want to file, 'cause it'll come back to me. [10/12/2012 Mot Hr'g & Plea Hr'g Tr 17-23.]

The prosecutor never objected and even expressed agreement that that an appeal was "possible." (*Id*., p 19 lns 24-25.)

## STANDARD OF REVIEW

"In considering a trial court's ruling on a motion to suppress, [this Court] review[s] its factual findings for clear error and its interpretation of the law de novo." *People v Dunbar*, 499 Mich 60, 66; 879 NW2d 229, *cert. denied sub nom. Dunbar v Michigan*, 137 S Ct 161 (2016). "To the extent that a trial court's ruling on a motion to suppress involves an . . . application of a constitutional standard to uncontested facts, [the Court's] review is de novo." *People v Fisher*, 483 Mich 1007, 1009; 765 NW2d 19 (2009). The Court also reviews de novo the interpretation and application of a court rule. *Snyder v Advantage Health Physicians*, 281 Mich App 493, 500; 760 NW2d 834 (2008).

## ARGUMENT

In its order scheduling this appeal for mini-oral argument, this Court instructed the parties to address at oral argument: (1) "whether exigent circumstances authorized the officers' warrantless entry into the defendant's motel room" and (2) "if a constitutional violation did

occur, whether the defendant is entitled to withdraw his plea." Both questions were addressed in Mr. Horacek's application and his reply in support of the application, and the discussion below is not intended to replace that argument or restate it. It merely provides additional points and authorities that the Court should consider in resolving these issues.

## I. The government must show that the exigent circumstances justifying a warrantless entry were *known to the officers* at the time and were not created by their own unreasonable conduct.

"It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v New York*, 445 US 573, 586 (1980). The right to privacy marked by this law stands "as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation." *McDonald v United States*, 335 US 451, 453 (1948). "No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." *Stoner v State of Cal*, 376 US 483, 490 (1964) (internal citations omitted). The United States Supreme Court best described the policy behind this protection in *Johnson v United States*, 333 US 10, 13–14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[4] Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is

> also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

"In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 US 573, 590 (1980). To show this exception applies, the police must "establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect." *In re Forfeiture of $176,598*, 443 Mich at 271.

Mr. Horacek's reply in support of the application explains in detail why the government must present evidence—not just argument—to prove that exigent circumstances excused the officers from obtaining a warrant before breaking into Mr. Horacek's motel room. (Reply in Support of Appl'n 2-6.) It also explains why each of the government's unsupported explanations for why the police could not wait for a warrant before entering fails to demonstrate an exigency sufficient to bypass the Fourth Amendment's constitutional protection of a neutral magistrate. (*Id*.) But there are two additional points on this issue worthy of further discussion: First, to show the police held a "reasonable and objective belief" that exigent circumstances existed, the government most show those exigent circumstances were *known to the officers* at the time. *United States v Banks*, 540 US 31, 37 (2003). Second, the exigency cannot be created by the officers' own unreasonable conduct. *Kentucky v King*, 563 US 452, 462 (2011).

There is no testimony regarding what the officers knew at the time, only the concession that they saw a man run toward a bathroom *after* they entered without a warrant. This observation has been touted as cause for concern that evidence would be destroyed if they waited

for a warrant. But the unlawful entry is what caused this exigency in the first place. It therefore cannot be used as justification either for the initial warrantless entry with a key card that occurred *before* the exigency arose, or for breaking down the door after the initial entry created the exigency.

### A. The police must produce evidence of specific and objective facts establishing the existence of an emergency and known to the officers at the time.

When the government seeks to justify a warrantless entry into an abode on the basis of exigent circumstances, the court's determination as to whether a Fourth Amendment violation occurred "turns on the significance of the exigency revealed by circumstances known to the officers." *Banks*, 540 US at 37 (finding that an exigency justified entering an apartment without strict adherence to the Fourth Amendment's "knock and announce" rule). After-acquired evidence of an exigency is not enough; the government must also establish what the officers knew at the time.

Here, there is no admissible evidence to show what information the officers possessed at the time of their warrantless entry because the government never offered any testimony or other admissible evidence on that issue. The prosecution merely presented an unsupported summary of his version of the circumstances that evening. The prosecutor's prose is not admissible evidence; it cannot "establish the existence of an actual emergency." *In re Forfeiture of $176,598*, 443 Mich at 271.

The burden is on the government to produce evidence that an exception to the Fourth Amendment's warrant requirement applies. *People v Blasius*, 435 Mich 573, 595 (1990). Where the government fails to present even one iota of admissible testimony to show that the circumstances known to the officers justified their entry into a home or motel room without a warrant, the court must conclude that the warrantless entry was unjustified and hold that the

search and seizure was in violation of the Fourth Amendment. The trial court clearly erred in making factual findings based on the assertions of the prosecutor.

### B. The government cannot create the exigency through its own unreasonable conduct of entering the motel room without a warrant.

Even if the prosecution's unsupported description of the circumstances could support the trial court's findings, the trial court further erred in holding that facts justified a warrantless entry into Mr. Horacek's motel room. (See Reply in Support of Appl'n 2-6.) This is true for all of the reasons given in Mr. Horacek's reply in support of his application, but also for one additional reason: "[T]he exigent circumstances rule justifies a warrantless search [only] when the conduct of the police preceding the exigency is reasonable." *King*, 563 US at 462. In this case, the government has argued that the officer's entry was justified by a concern about the imminent destruction of evidence. This argument is based on an assertion that officers saw a man moving toward the bathroom after the officers unlawfully tried to use a key card to enter Mr. Horacek's motel room without a warrant. And this is a classic example of unreasonable conduct creating the exigency. The initial entry with a key card was a Fourth Amendment violation in itself because it was not justified by some other exigency before that entry occurred. Subsequent events triggered by that unreasonable search, such as a man running toward the bathroom, cannot be used to justify the warrantless entry either before or after that officer-created exigency arose.

### C. The refusal to suppress the narcotics evidence is pertinent to Mr. Horacek's motion and his decision to plea.

The Prosecuting Attorneys Association of Michigan argues as an *amicus* that the denial of Mr. Horacek's request to suppress narcotics and drug paraphernalia is not pertinent here because that evidence would not be relied upon to support the charge of unarmed robbery. This argument does not comport with the realities of criminal prosecution and plea negotiation.

At the plea stage, it is difficult to assess what impact certain evidence will have in a case or whether it will ever come in. One important purpose of filing a motion in limine—motions to suppress being one of that sort—is to obtain certainty before the trial begins so that the defendant can more accurately assess the risks before proceeding with trial. Mr. Horacek did exactly that, asking the trial court to exclude evidence of narcotics in the motel room, and the court refused. He had to assume at that point that the evidence of narcotics could be used in his trial for unarmed robbery, probably as evidence of motive or an explanation for not finding the money from the register. Introducing this evidence would, of course, impact his defense, which is why the prosecutor would not agree to its exclusion. Because the motion to suppress was denied, Mr. Horacek had to take into account the risk that this evidence would be introduced when deciding whether to accept the plea. Because Mr. Horacek could be justifiably concerned upon denial of his motion that the evidence might still be used against him in one way or another in this case, it cannot be deemed irrelevant to his decision to plea.

If the government had no intention of using the evidence in this case, it could have conceded that point, and thereby avoided this impact on Mr. Horacek's plea decision. It did not do so, presumably because it wished to preserve the option of using it, either as evidence in the case or to pressure Mr. Horacek to enter a plea. Having fought to keep that evidence in play prior to Mr. Horacek's plea decision, the government is not in a position to now argue that the evidence is irrelevant and should not have impacted Mr. Horacek's plea.

## II. Mr. Horacek should be permitted to withdraw his plea.

Under the Sixth Amendment to the United States Constitution, a criminal defendant has the right to be tried by a jury of his peers. For the defendant's plea to constitute a valid waiver of that right, the defendant must understand the consequences of his plea. *People v Cole*, 491 Mich

324, 327-328; 817 NW2d 497 (2012). There can be no dispute that Mr. Horacek entered into a plea based on the understanding—induced by representations of his counsel and the court and the tacit consent of the prosecuting attorney—that his plea would preserve his appeal of the order denying suppression of evidence, and that if the order was reversed, he could withdraw his plea and "start fresh." For the reasons given below, the Court should hold that Mr. Horacek's plea was conditional and may be withdrawn under MCR 6.301(C)(2). However, if the Court disagrees, and holds that lack of prosecutability is still a requirement to enter a conditional plea under *People v Reid*, 420 Mich 326; 362 NW2d 655 (1984), it should still permit Mr. Horacek to withdraw his plea because the record shows that he did not understand his waiver of the right to trial was unconditional.

### A. Mr. Horacek's plea was conditional under MCR 6.301(C)(2).

"Michigan courts construe court rules in the same way that they construe statutes." *Snyder*, 281 Mich App at 501. The analysis of a court rule begins with the specific language at issue. *Id*. "This Court gives effect to the rule maker's intent as expressed in the court rule's terms, giving the words of the rule their plain and ordinary meaning." *Id*. "If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written." *Id*.; see *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005).

Under the plain language of MCR 6.301(C)(2), "[a] conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal." And the only requirements for such a plea under that rule are: (1) the court and the prosecutor must consent, and (2) the "ruling or rulings as to which the defendant preserves the right to appeal must be specified orally on the record or in a writing made a part of the record." *Id*. The text of

the court rule contains no requirement that the case lack "prosecutability" upon reversal for a conditional plea to enter. Adhering to the plain language rule in this case means enforcing only the terms found in MCR 6.301(C)(2) and eschewing additional terms that were not expressly incorporated from prior case law.

If the Court does look beyond the plain language of the rule, then it will find a host of other reasons why it should conclude that its original intent in promulgating this rule five years after *Reid* was to allow conditional pleas even where the case is still prosecutable following reversal. The most obvious reason is the Staff Comment to this rule, which indicates that this is exactly what the Court intended to do. *Gladych v New Family Homes, Inc*, 468 Mich 594, 601 n 4; 664 NW2d 705 (2003) (holding "[i]t would be proper, however, to turn to the Committee Comment if the statutory language were ambiguous. Although the committee comments lack the force of law, they may be useful interpretive aids."). The MCR 6.301, 1989 Staff Comment states:

> This subrule *expands* the availability of the conditional plea procedure to the *other forms of plea* available under these rules. It also permits a conditional plea to be used to preserve challenges to one or more pretrial rulings and places *no limitation on the type of ruling that may be preserved*. Consistent with *Reid*, however, it requires that the defendant be permitted to withdraw the plea *if any ruling* preserved by this procedure is overturned on appeal. [Emphasis added.]

Given this explanation of the rule, it is difficult to conceive that the Court simply overlooked *Reid*'s prosecutability requirement when it amended the rule 5 years after *Reid*.

As the Court knows, such comments are generally included the administrative orders proposing a rule amendment, and those orders are typically published for public comment. The Court then holds a public hearing on the rule amendment. It borders on disrespect to believe that the justices of this Court would have gone through that process, held a hearing, and been

unaware of the Staff Comment announcing that this rule amendment expands the conditional plea procedure initiated in *Reid*. The Court would not have explicitly incorporated part of *Reid* but then left out all mention of prosecutability requirement if it had intended to incorporate that requirement.

This situation is analogous to one where the Legislature supersedes a common-law rule with enactment of its own laws on the subject. For example, in *GM Corp v Devex Corp*, the United States Supreme Court held that the federal damages statute, 35 USC § 284, did not incorporate the federal common law standard mandating that prejudgment interest could not be awarded where damages were unliquidated, absent bad faith or other exceptional circumstances. 461 US 648, 653 (1983). Rather, the federal damages statute gave the court general authority to fix interest and costs and the face of the statute did not restrict the court's authority to award interest to exceptional circumstances. *Id.* The court held that there was no reason to impose the limitation previously imposed under federal case law, because if Congress had wished to enact this limitation it would have done so explicitly. *Id*. Likewise, if this Court had intended to impose the prosecutability requirement when it promulgated MCR 6.301(C)(2), it would have done so explicitly.

The Court's decision to eliminate the prosecutability requirement makes sense. The conditional plea is a meaningful tool for expediting the resolution of cases while still affording defendants the opportunity to challenge erroneous rulings that likely made a difference in the plea negotiations. If conditional pleas were limited only to situations where a defendant could avoid prosecution altogether, defendants would be forced to empanel a jury and expend judicial and appointed-attorney resources on a likely pointless trial just to preserve an appeal of an

improvident but significant pre-trial decision that may not be dispositive, but could still be highly prejudicial to the defendant's case.

In *People v Jacobsen*, for instance, the defendant entered a conditional plea of guilty of driving under the influence pursuant to MCR 6.301(C)(2). 205 Mich App 302, 303-304; 517 NW2d 323 (1994), reversed on other grounds, 448 Mich 639; 532 NW2d 838 (1995). The defendant preserved for appeal the issue of whether the court should have appointed and paid for an expert witness to testify as to the reliability of a breathalyzer test. *Id.* at 304. The Court of Appeals found that an expert witness should have been appointed. *Id.* at 305. Like every other opinion from the Court of Appeals after MCR 6.301(C)(2) was enacted (except this one), the court made no inquiries as to the prosecutability of the case following its decision. It simply reversed and remanded for further proceedings in accordance with MCR 6.301(C)(2). *Id.* at 308. Though this Court ultimately disagreed with the Court of Appeals' decision to reverse and reinstated the circuit court's decision, see *Jacobsen*, 448 Mich at 641, the failure to appoint an expert may, in another case, prove to be highly prejudicial.

Conversely, it is difficult to see the harm in allowing such conditional pleas when they require the consent of the court and the prosecuting attorney. The prosecuting attorney may prefer the minimal risk of reversal and withdrawal of the plea over being forced to try the case merely so the defendant can preserve his right to appeal an issue that he sees as significant but ultimately lacks merit. Indeed, the chances are quite high that there will be no remand for withdrawal of the plea. First of all, the appeal is by leave only. MCR 6.301(C)(2). Second, in every case to date except for *Jacobsen*, the Court of Appeals has ruled in the government's favor

when it did grant leave.[2] Finally, if the prosecuting attorney does not see any advantage to securing the defendant's plea on a conditional basis, then the prosecutor can simply decline. This Court likely realized there was little downside to expanding the conditional plea process in light of the mutual-consent and appeal-by-leave restrictions when it decided not to incorporate prosecutability into MCR 6.301(C)(2).

Having established that MCR 6.301(C)(2) does not and should not incorporate the prosecutability requirement of *Reid*, Mr. Horacek must only show that the ruling as to which he reserved the right to appeal was specified on the record and that the court and the prosecutor consented to the conditional plea. See MCR 6.301(C)(2). As demonstrated by the transcript of the motion-to-suppress hearing, Mr. Horacek's attorney indicated to the court that Mr. Horacek was not willing to accept the plea bargain that was being offered to him until he was certain that he had preserved his rights for appellate purposes. The parties engaged in a lengthy discussion about the preservation of the Fourth Amendment issues for appellate review, at which point the trial judge repeatedly told Mr. Horacek he could appeal the suppression motion despite the plea. (10/12/2012 Mot Hr'g & Plea Hr'g Tr 17-23). Even when Mr. Horacek entered his plea, the court again clarified that "All the issues . . . are preserved." (*Id*. at 39.) The ruling at issue was specified on the record and the court consented to the conditional plea. The prosecutor also tacitly consented by not objecting to the conditions placed on the plea. See *People v Gonzalez*, 214 Mich App 513, 516; 543 NW2d 354 (1995) ("The prosecutor's silence constituted a tacit

[2]*People v Cooley*, No 304071, 2012 WL 6633989 (Mich Ct App, Dec 20, 2012); *People v. Abed*, No 301459, 2012 WL 716276 (Mich Ct App, Mar 6, 2012); *People v Hall*, No 213299, 1999 WL 33438125 (Mich Ct App, Jul 30, 1999); *People v Laning*, No 202011, 1999 WL 33445184 (Mich Ct App, Apr 30, 1999); *People v Rauschenberger*, No 205304, 1999 WL 33445328 (Mich Ct App, Apr 30, 1999); *People v Garten*, No 185513, 1998 WL 2016609 (Mich Ct App, Mar 13, 1998); *People v Mason*, No 172463, 1996 WL 33324019 (Mich Ct App, Jul 5, 1996); *People v Spraggins*, No 179110, 1996 WL 33364193 (Mich Ct App, Jun 4, 1996).

adoption of the magistrate's decision."). Consequently, Mr. Horacek's plea was conditional pursuant to MCR 6.301(C)(2) and he is entitled to withdraw his plea.

### B. If Mr. Horacek's plea was unconditional, then it was not knowing and voluntary, because counsel and the trial court told him it was conditional.

In the unlikely event that the Court concludes that the prosecutability requirement still applies and that Mr. Horacek's plea is unconditional, then his plea is in violation of MCR 6.302(A) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Cole*, 491 Mich at 328. "For a plea to constitute an effective waiver of these rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing." *Id*. at 332-333. MCR 6.302(A) likewise requires pleas to be "understanding, voluntary, and accurate." A plea is knowing and voluntary when it is an "intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences" and when the defendant is "fully aware of the direct consequences" of the plea. *Brady v United States*, 397 US 742, 748, 755 (1970). When a defendant is not fully informed of the consequence of his plea, his plea, as an agreement to forego trial, was not "understanding and voluntary," and he should be given "the opportunity to withdraw his plea." *Cole*, 491 Mich at 328, 338.

As noted above, the trial judge affirmatively told Mr. Horacek on several occasions that he could appeal the suppression motion notwithstanding the plea. Mr. Horacek was told that his plea was conditional and that if the condition was satisfied—*i.e.* he was successful on his suppression motion—he would be able to return to the trial court and "start fresh," i.e., withdraw his plea. (10/12/2012 Mot Hr'g & Plea Hr'g Tr 23.) If Mr. Horacek succeeds on the appeal of his suppression motion but is not allowed to withdraw his plea, then his decision to accept the plea cannot have been done with "sufficient awareness of the . . . likely consequences" nor can Mr. Horacek have been "fully aware of the direct consequences" of the plea. See *Brady*, 397 US

at 755. Accordingly, regardless of how this Court interprets MCR 6.301(C)(2) as it applies to *Reid*, if Mr. Horacek prevails in his appeal of the suppression motion, he should be permitted to withdraw his plea.

## CONCLUSION AND REQUESTED RELIEF

The government cannot satisfy its burden of showing that an exception to the warrant requirement exists without offering testimony or other admissible evidence as to what exigent circumstances were known to the officers at the time. But even if this Court were to casually and improvidently throw the age-old rules of evidence and judicial fact-finding out the window, Mr. Horacek would still prevail, because none of the prosecutor's unsupported factual assertions about the circumstances of the entry provide a constitutionally adequate explanation for why the officers could not comply with the Fourth Amendment's dictate to obtain a warrant before entering Mr. Horacek's motel room. In light of this and the fact that Mr. Horacek was told that he could withdraw his plea should the Court reverse on this Fourth Amendment issue, the Court should permit him to withdraw his plea, whether under MCR 6.301(C)(2) or under *People v Cole*, 491 Mich at 338.

Respectfully submitted,

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